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No. 1065

In the

Supreme Court

of the

United States

October Term, 1957

[illegible]

Petitioner,

vs.

[illegible]

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

THE UNITED STATES, PETITIONER

v.

EDWARD LEWIS FIELD AND WALTER L. SHERFEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINIONS BELOW

The opinion of the Court of Claims in *Field* v. *United States* (Appendix A, *infra* pp. 14–20) is reported at 158 F. Supp. 580. The opinion in *Sherfey* v. *United States* (Appendix B, *infra*, pp. 21–26) is not as yet reported.

JURISDICTION

The judgments of the Court of Claims were entered on January 15, 1958 (Appendix A, *infra*, p. 20; Appendix B, *infra*, p. 26). On April 10, 1958, the time for filing a petition for a writ of certiorari was extended by the Chief Justice to and including May 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

A large number of officers of the armed forces served on active duty in World War I, thereafter retired in the period between the two wars, and were recalled to active duty during or after World War II. The question presented is whether these officers, upon their subsequent reversion to retired status, are entitled to retired pay computed as if they had been on active duty continuously from World War I, or to retired pay computed without credit for their previous periods of retirement.

STATUTES INVOLVED

1. Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 367, as amended, 37 U. S. C. 115, provides:

> The retired pay of any officer of any of the services mentioned in the title of this Act [Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service] who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

2. Section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085, 10 U. S. C. (1952 ed.) 1002, provides:

> Each commissioned officer of the Regular Army or of any reserve component of the Army of the United States, and each commissioned officer of the Regular Air Force or of any reserve component of the Air Force of the

United States, heretofore or hereafter retired or granted retirement pay under any provision of law shall be advanced on the applicable officers' retired list to the highest temporary grade in which he served satisfactorily for not less than six months while serving on active duty, as determined by the cognizant Secretary, during the period September 9, 1940, to June 30, 1946, and shall receive retired pay at the rate prescribed by law, computed on the basis of the base and longevity pay which he would receive if serving on active duty in such higher grade: *Provided,* That retired pay of such highest grade shall be without credit for service on the retired list.

STATEMENT

1. *Field.* Field, a regular Army officer, served on active duty from 1917 until 1935 when he was retired in the grade of Captain (R. 2). He was recalled to active duty in 1941 and thereafter served until 1946, finally attaining the rank of Colonel which he held for a period of some three months (R. 2). In October 1946, Field was released from active duty and reverted to his former grade of Captain on the retired list (R. 2). Pursuant to Section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085, *supra*, pp. 2–3, Field was, as of the date of passage of that Act, advanced on the retired list to the highest grade held by him on active duty for more than six months, namely, the grade of Lieutenant Colonel, and was paid retired pay based on that grade "without credit for service on the retired list." Section 203 (a) of the Act of June 29, 1948, *supra* (R. 2).

In this suit in the Court of Claims, Field sought the difference between the retired pay which he received—that of a Lieutenant Colonel with over 23 years of service—and retired pay computed to include his time on the retired list and to reflect his briefly held grade of Colonel (the pay of a Colonel with over 28 years of service) (R. 3, 4).

2. *Sherfey.* The facts in the *Sherfey* case are substantially the same as those in *Field.* Sherfey, a regular Army officer, served on active duty from 1917 until 1932 when he was retired in the grade of Captain (R. 1). He was recalled to active duty in 1940 and thereafter served until 1948, finally attaining the rank of Lieutenant Colonel (R. 2). In August 1948, Sherfey was released from active duty and reverted to his retired status (R. 2). Pursuant to Section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085, *supra*, pp. 2–3, Sherfey was advanced on the retired list to the highest grade held by him on active duty for more than six months, namely, that of Lieutenant Colonel, and was paid retired pay based on that grade without credit in the computation of such pay for his eight years of retirement between 1932 and 1940 (R. 2).

Sherfey sued in the court below for the difference between the retired pay which he received—that of a Lieutenant Colonel with over 23 years of service—and retired pay computed to include his time on the retired list (the pay of a Lieutenant Colonel with over 30 years of service).

3. *The decisions below.* As just noted, Field, who spent five years in retired status drawing retired pay,

and Sherfey, who spent eight years in retired status drawing retired pay, brought suit to have these periods of retirement included in the calculation of their present retired pay. They claimed that, by reason of their reversion to the retired list after their period of World War II service, they were "hereafter retired" ("re-retired") within the meaning of Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 367, *supra*, p. 2, and were thus entitled to retired pay at the rate of 75% of their active duty pay.[1] On cross motions for summary judgment, the Court of Claims agreed with respondents. Holding that a retired officer is "re-retired," or (in the language of the 1942 Act) "hereafter retired," when he reverts to retired status after a period of active duty, the court awarded respondents the difference between the pay they have received and pay computed to include time spent by them in retirement (Sherfey, R. 31–34; Field, R. 32–37).

REASONS FOR GRANTING THE WRIT

Although the question we present is a limited one dealing with the retirement pay of a group of military officers who served in both World Wars, we believe that it is worthy of consideration by this Court. There is involved a very large sum of money (running well over 30 millions of dollars); and the ruling below discriminatorily distorts (with respect to retire-

[1] Since active duty pay was based on both active and inactive (including retired) time (Section 1 of the Act of December 2, 1942, 56 Stat. 1037), 75% of active duty pay, as retired pay, would necessarily include credit for time on the retired list.

ment pay) the careful balance Congress has kept between those officers who remained continuously on active duty between the two wars and those who enjoyed long periods of civilian life but returned to service during World War II. These results of the decision below cannot now be cured by legislation, and the only practicable remedy lies in this Court. A ruling with such effects deserves review.

1. In the period following World War I, officers of the regular establishment who had served in that war fell, generally speaking, into two categories:—those who retired and those who continued their careers in the service. Many officers retired with pay as early as 1921 while others served as professional military men through the 1920's and 1930's, and were in active service at the outbreak of World War II. With the onset of that conflict, the military establishment utilized not only those officers who were then, and had continuously been, in active service but also recalled thousands of the World War I officers who had been retired. Congress recognized that both these groups, by virtue of the service they performed in the First World War and the active duty they were about to perform in the Second, were deserving of special recognition, but it also saw that consideration of their different backgrounds called for differing treatment. Additionally, Congress recognized that existing pay and retirement legislation was inadequate to both the needs and the just desserts of either group.

In the case of those officers who had retired between the wars, pay upon recall to active duty would,

by law, reflect only their prior periods of active service.[2] Because of this state of the then existing legislation, those retired officers who were recalled would receive active duty pay which would not reflect their age.[3] To remedy this situation, Congress provided, by Section 1 of the Act of December 2, 1942, 56 Stat. 1037, that such officers were entitled to have credited in the computation of their *active duty pay* their years of retirement.

Those officers who had served continuously presented no such problem. However, under the existing law, there was no provision for recognition of their service in the two World Wars, and recognition could only adequately be provided by an increase of their retired pay. For, while the retired pay they would be entitled to receive when their active service was over might be as high as 75% of active duty pay for some of them, it clearly would not be that high for all or most of them.[4] For the benefit of this group of officers, Congress provided a uniform 75% of active

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[2] Act of May 12, 1917, 40 Stat. 48; Act of June 10, 1922, Sec. 1, 42 Stat. 627 (37 U. S. C. (1940 ed.) 4).

[3] *I. e.*, an officer who retired in 1930 at the age of 40 years in the grade of Major and who then had 15 years of service for longevity pay purposes, would, upon his recall to active duty in 1940, be entitled to the active duty pay of a Major with only 15 years of service although he was then 50 years old. Another officer who had not retired would be entitled to the pay of a Major with longevity credit for 25 years of service at the same age.

[4] See, *e. g.*, Section 5 of the Act of July 31, 1935, 49 Stat. 507, under which officers retiring for length of service were entitled to retired pay at the rate of 2½% of their active duty pay multiplied by years of service not to exceed 29 years.

duty pay upon their retirement "hereafter," *i. e.*, after 1942.[5]

In further recognition of the service performed by both the officers with continuous service and those officers who were recalled from retirement, Congress, in 1948, authorized the retirement of both groups in the highest temporary grade held by them for more than six months during the 1940–1946 period.[6] But this right, of especial value to the officers who were called from retirement,[7] was expressly limited by Congress; recalled officers, while retiring in their highest temporary grades, could not be credited for retired pay purposes with the time they spent on the retired list. Act of June 29, 1948, *supra*, fn. 6, and *supra*, p. 3. The limitation was in accord with a consistent legislative policy of prohibiting the inclusion of time spent in retirement in the computation of retired pay.[8] The reasons for this consistent policy are

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[5] Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 367 (37 U. S. C. 115), quoted *supra*, p. 2.

[6] Section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085 (10 U. S. C. (1952 ed.) 1002). Without such provision, officers of both classes would be required to retire in their regular grades and not in the grades to which they were temporarily promoted. See, *e. g.*, Act of June 10, 1922, Sec. 17, 42 Stat. 632 (10 U. S. C. (1940 ed.) 1012); Act of June 25, 1941, 55 Stat. 263 (37 U. S. C. (1940 ed., Supp. I) 26).

[7] The Act of June 25, 1941, *supra*, fn. 6, expressly prohibited the use of active duty after retirement to effect entitlement to promotion.

[8] See, *e. g.*, Section 5 of the Act of July 31, 1935, *supra*, fn. 4 (2½% of active duty pay multiplied by years of *active* service); Act of June 10, 1922, Sec. 1, 42 Stat. 627 (37 U. S. C. (1940 ed.) 4) (only active duty countable for longevity pay purposes). The codification of Section 203 (a) of the Act of June 29,

plain—there would be no fairness and little incentive to continued service in a career retirement system which gave the same retired pay to an officer with 30 years of active service as it gave to an officer with 15 years of active service and 15 years on the retired list with retired pay and opportunities for remunerative civilian employment.

2. This consistent Congressional policy and the sound reasoning behind it were disregarded by the Court of Claims in the case of *Gordon* v. *United States*, 134 C. Cls. 840, where the court, through a mechanistic interpretation of the words "hereafter retired" in the Pay Readjustment Act of 1942—which was passed to favor regular officers who had served continuously on duty since World War I, see *supra*, pp. 7–8—arrived at the conclusion that a retired World War I naval officer recalled to active duty in World War II was entitled to have included, in his future retired pay, credit for his years on the retired

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1948, *supra*, fn. 6, and pp. 2–3, further illustrates this policy. Section 203 (a) (10 U. S. C. (1946 ed.) 1002) now appears as 10 U. S. C. (1952 ed., Supp. V) 3991. The revision notes to the codification state: "The provisos of 10 [U. S. C.] 1002 ["Provided, That retired pay of such highest grade shall be without credit for service on the retired list."] and 1005 are omitted as surplusage, *since no formula for the computation of retired pay includes inactive service on the retired list as a credit.*" S. Rep. 2484, 84th Cong., 2d Sess., p. 282 (emphasis added). Since Congress' concern with military pay matters is and always has been a close and continuing one, the entire stream of legislation must be viewed together and as a whole. *Brown* v. *Duchesne*, 19 How. 183.

list.[9] While Section 203 (a) of the Act of June 29, 1948, *supra*, pp. 2–3, with its clear and specific prohibition against such inclusion was brought to the attention of the court in that case, it was recognized that that statute, relating as it did to the Army and Air Force, had no specific application in the Navy case. Accordingly, the Government did not apply for certiorari in *Gordon* but decided to await the court's reexamination of the problem in the light of the 1948 Act in a case where that Act was, in the Government's view, specifically applicable. However, the court has adhered to its *Gordon* ruling in the instant Army cases, and the principle of "re-retirement" has now been held applicable to all the services.[10]

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[9] Section 15 of the Pay Readjustment Act of 1942, *supra*, p. 2, provides that an officer "hereafter retired" shall be entitled to receive 75% of his active duty pay at the time of his retirement. By holding that a retired officer recalled to active duty and then released to the retired list was "hereafter retired" (*i. e.*, "re-retired"), the court brought the officer within the class of those retired after the passage of the 1942 Act. Since a retired officer who was recalled was entitled to count his service on the retired list in the computation of his *active duty pay* (Act of December 2, 1942 (*supra*, p. 7)), by the court's decision he became entitled to retired pay at the rate of 75% of his active duty pay with full credit for his time on the retired list.

[10] In the opinions below, the court did not view the 1948 Act as applicable in any manner. (It did not mention the revision notes on the 1956 Code referred to *supra*, fn. 8). By elevating its judicial construction of the 1942 Pay Readjustment Act in the *Gordon* case to the status of a "right" to higher retired pay, it "saved" the *Gordon* decision to the plaintiffs here under the savings provision of the 1948 Act. Section 205 (b) of the Act of June 29, 1948, 62 Stat. 1086, Appendix A, *infra*, p. 17.

By holding that the words "hereafter retired" in the 1942 Act cover and apply to an officer retired as early as 1921 [11] who was called to active service after 20 years of retirement with pay (and an opportunity for gainful civilian employment) and who then reverted to the retired list after a period of active duty in World War II,[12] the Court of Claims confers on such officers retired pay equal to that of one who served on active duty continuously during the same period between the two wars. If a retired officer who is recalled to active duty is "hereafter retired" or "re-retired" when he is released from active duty, then an officer twenty years in retirement, called to active duty for one month to sit on a selection board,[13] becomes, under the court's mechanical reading of the statute, entitled to an increase in his retired pay representing twenty years on the retired list when he reverts to retired status after that month. It is immaterial that such an officer has been drawing retired pay

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[11] See, *e. g.*, *Payne* v. *United States*, C. Cls. No. 295-57, now pending in the court below.

[12] Once retired, an officer would seem to be retired for all time and not subject to being retired again, but only to reverting to his retired status. Contrast *Danielson* v. *United States*, 121 C. Cls. 533, where a recalled retired officer sustained additional physical disability and was released to the retired list only after being found by a Retiring Board to have sustained additional physical disability. This would be a new retirement on a different basis.

[13] Since selection (*i. e.*, promotion) boards must be composed of officers who rank the candidate for promotion (*e. g.*, 10 U. S. C. (1952 ed., Supp. V) 5701), it is often necessary to recall retired officers to consider promotions to ranks above Captain in the Navy and Colonel in the Army and Air Force.

in the intervening period, has very likely been lucratively employed in the civilian world, and has thus been given a great preferment over brother officers who have been continuously in service. There will nevertheless be these windfall increases in retired pay to officers who happen to be recalled for short periods; and, even as to those who serve again for a long period, the novel rule has been created that retired pay can be increased by periods during which no service is performed but the receipt of retired pay.

3. Aside from these anomalies and inequities, the decisions below impose an enormous liability on the United States. During the period 1940 to 1946, there were 2,600 retired officers recalled to active duty after periods of retirement varying from three to 20 years. The liability of the United States for six years of back pay alone,[14] would be $17,732,000.[15] The General Accounting Office, under its ten year statute of limitations,[16] would, if these decisions are allowed to stand,

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[14] Under the six-year statute of limitations applicable in the Court of Claims, 28 U. S. C. 2501.

[15] This is the amount if the average recovery is figured to be $6,820. The recovery in the *Field* case would amount to $10,019.08. The recovery in the *Gordon* case, *supra*, was $4,425.74.

[16] 31 U. S. C. 237 provides in relevant part:

"Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title, shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such claim first accrued: * * *."

be obligated to pay $29,553,000 in back pay claims alone. These figures do not take into account liability for current and future retired pay which is bound to accumulate several more millions of dollars.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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MAY 1958.

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 525–53

(Decided January 15, 1958)

EDWARD LEWIS FIELD *v.* THE UNITED STATES

Mr. Guy Emery for plaintiff. *Messrs. Ansell and Ansell* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant. *Mrs. Sondra K. Slade* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LITTLETON, *Judge,* delivered the opinion of the court:

Plaintiff sues to recover additional retired pay which he claims is due him under the provisions of paragraph 4 of section 15 of the Pay Readjustment Act of June 15, 1942, 56 Stat. 359, 368, which provides as follows:

> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

Plaintiff served on active duty with the United States Army prior to November 12, 1918. On December 31, 1935, he was retired for physical disability in the grade of captain. On October 27, 1941, plaintiff was recalled to active duty and served thereon continuously until October 16, 1946. While serving on active duty, plaintiff, on June 28, 1946, was promoted to the rank of colonel. From then until his return to the retired list in October, he received the active duty pay of a colonel with over 28 years of service, active and inactive.[1] Upon plaintiff's reversion to inactive status on the retired list on October 16, 1946, his retired pay was computed at the rate of 75 percent of the active duty pay of a captain with over 23 years of service. On June 29, 1948, plaintiff was advanced on the retired list to the grade of lieutenant colonel and from that date has received retired pay computed at the rate of 75 percent of the active duty pay of a lieutenant colonel with over 23 years' service.[2]

Plaintiff contends that on the occasion of his return to the retired list on October 16, 1946, his retired pay should have been computed in accordance with the provisions of paragraph 4 of section 15 of

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[1] The eleventh paragraph of section 1 of the Pay Readjustment Act of 1942, *supra*, was amended by the Act of December 2, 1942, 56 Stat. 1037, to provide that the active duty pay of officers should credit for pay purposes "full time for all periods during which they have held commissions as officers of any of the services mentioned in the title of this Act, * * *." Under this provision, plaintiff's active duty pay was computed not only on the basis of his years of active duty, but also his years of inactive duty on the retired list.

[2] This advancement on the retired list and increase in retired pay was apparently the result of the Army's belief that section 203 (a) of the Act of June 29, 1948, 62 Stat. 1985, discussed hereinafter, was applicable to plaintiff.

the Pay Readjustment Act of 1942, set forth above. Such a computation would have resulted in plaintiff's having received retired pay at the rate of 75 percent of the active duty pay of a colonel with more than 28 years of active and inactive service which was the active duty pay he was receiving at the date of his reversion to the retired list.

On the basis of the language of paragraph 4 of section 15 of the 1942 Act as interpreted by this court in the case of *Gordon* v. *United States*, 134 C. Cls. 840, plaintiff herein was "hereafter retired" within the meaning of that act, and, because he had served in the military forces of the United States prior to November 12, 1918, he was entitled to have his retired pay computed on the basis of 75 percent of the active duty pay he was receiving on October 16, 1946. *Sherfey* v. *United States*, No. 324–56, decided this day.

In its motion for summary judgment, defendant takes the same position in the instant case that it took in the *Sherfey* case, *supra*, and urges that section 203 (a) [3] of the 1948 Act, 62 Stat. 1085, in some

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[3] Section 203 (a) provides as follows:

Each commissioned officer of the Regular Army or of any reserve component of the Army of the United States, and each commissioned officer of the Regular Air Force or of any reserve component of the Air Force of the United States, heretofore or hereafter retired or granted retirement pay under any provision of law shall be advanced on the applicable officers' retired list to the highest temporary grade in which he served satisfactorily for not less than six months while serving on active duty, as determined by the cognizant Secretary, during the period September 9, 1940, to June 30, 1946, and shall receive retired pay at the rate prescribed by law, computed on the basis of the base and longevity pay which he would receive if serving on active duty in such higher grade: *Provided*, That retired pay of such highest grade shall be without credit for service of the retired list.

way operates to deprive officers, who would otherwise qualify, of the benefits of paragraph 4 of section 15 of the 1942 Pay Readjustment Act. The only factual difference between this case and the *Sherfey* case is that Sherfey reverted to inactive status on the retired list after the passage of the 1948 Act and plaintiff herein was returned to the retired list prior to the effective date of the 1948 Act. As we stated in our decision in the *Sherfey* case, paragraph 4 of section 15 of the 1942 Act was not repealed by the 1948 Act. On the contrary, section 205 (b) of the 1948 Act, reserves to officers such as plaintiff the benefits of the 1942 legislation. Section 205 (b), 62 Stat. 1085, provides, in part, as follows:

> Nothing contained in this title [Title II] shall be construed to deprive any person of any higher retired grade or rank, or any greater retired or retirement pay to which he or she may be entitled under any other provision of law. * * *

Furthermore, when the 1942 Act was repealed by the Career Compensation Act of 1949, 63 Stat. 839, paragraph 4 of section 15 was expressly excepted from such repeal. Section 531 (b) (34).

Since plaintiff served on active duty prior to November 12, 1918, and was "hereafter retired" within the meaning of paragraph 4 of section 15 of the 1942 Pay Readjustment Act, he is entitled to have his retired pay computed at the rate of 75 percent of the active duty pay he was receiving on October 16, 1946, when he was returned to inactive duty on the retired list. Plaintiff's active duty pay at the time of his return to the retired list was that of a colonel with over 28 years of service.

Plaintiff was erroneously paid retired pay computed at the rate of 75 percent of the active duty

pay of a captain with over 23 years of service from October 16, 1946, to June 29, 1948, and at the rate of 75 percent of the active duty pay of a colonel with over 23 years of service from June 29, 1948. He is entitled to receive the difference between the pay he has received and retired pay properly computed on the basis of 75 percent of the active duty pay of a colonel with over 28 years of service to the extent that his claim for such increased retired pay is not barred by the statute of limitations.

Plaintiff concedes that he is entitled to recover only those installments of retired pay which were due and not paid during the six years prior to the filing of his petition on September 4, 1953. He urges he is entitled to recover for the period commencing September 1, 1947, and continuing until judgment herein. *Gordon* v. *United States*, *supra*; *Cannon* v. *United States*, 146 F. Supp. 827 (C. Cls. 1956).

Defendant concedes that under the ruling in the *Gordon* case, *supra*, plaintiff is entitled to recover all installments of pay which were due and unpaid during the six years prior to the filing of his petition. Defendant contends, however, that plaintiff did not assert his right to the benefits of paragraph 4 of section 15 of the 1942 Pay Readjustment Act until the filing of his second amended petition on October 2, 1956, and that therefore he is entitled to recover only back to October 1, 1950.

It is true that the original and first amended petitions in this case did not specifically state a claim under paragraph 4 of section 15 of the Pay Readjustment Act of 1942. However, the 1942 Act was cited in the petition. The period encompassed by the claim in the second amended petition is the same period as that set forth in the two earlier petitions, and the same facts which give rise to the present

claim were alleged in the earlier petitions. Plaintiff has abandoned his claims for increased disability retired pay asserted in the original and first amended petition, and, on the same facts alleged in the original petition, is now seeking to recover only the benefits to which he is entitled under paragraph 4 of section 15 of the 1942 Act. Rule 18 (c) of the Rules of the Court of Claims provides as follows:

> Relation Back of Amendments: Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Plaintiff's situation would appear to come within the scope of the above quoted rule. In the case of *The Equitable Trust Company, et al.* v. *United States*, No. 49631, decided November 6, 1957, plaintiff in a motion for a new trial asserted for the first time a claim for increased retired pay under paragraph 4 of section 15 of the 1942 Pay Readjustment Act. Defendant resisted the motion for new trial on the ground that the claim for the 1942 Act benefits had not been pleaded by the plaintiff, and that if such new cause of action was being pleaded at the time of the motion for a new trial, it was barred by the statute of limitations. The court held that the claim for increased retired pay, asserted for the first time in plaintiff's motion for new trial, covered the identical period encompassed by the claim asserted in the petition and arose out of the same facts alleged in the petition. The court held that the forms of pleading in this court are sufficiently flexible to permit the plaintiff to recover what is justly due him upon the facts stated in his petition, citing *Clark* v. *United States*, 95 U. S. 539; *Wood, et al.* v. *United States*, 49 C. Cls. 119, and *Electric*

Boat Co. v. *United States*, 66 C. Cls. 333. The court also quoted Rule 54 (c) of the Federal Rules of Civil Procedure, which provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even though the party has not demanded such relief in his pleadings.

Inasmuch as it appears that plaintiff would be entitled to recover the retired pay to which he is entitled under the 1942 Act on the facts alleged in his original petition, despite his failure to demand such relief in that petition, we cannot see how he is prejudiced by demanding that relief in an amended petition. On the basis of our Rule 18 (c) and the holding of this court in *The Equitable Trust Company, et al.* v. *United States, supra*, plaintiff is entitled to recover all installments of increased retired pay which were due and not paid from September 1, 1947, to the date of judgment herein and judgment will be entered in accordance with this opinion. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge*, concur.

LARAMORE, *Judge*, took no part in the consideration and decision of this case.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 324–56

(Decided January 15, 1958)

WALTER L. SHERFEY *v.* THE UNITED STATES

Mr. Guy Emery for plaintiff. *Mr. Penrose Lucas Albright* and *Messrs. Ansell and Ansell* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Acting Assistant Attorney General Geo. S. Leonard*, for defendant. *Mrs. Sondra K. Slade* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover additional retired pay which he claims is due him under the provisions of paragraph 4 of section 15 of the Pay Readjustment Act of June 16, 1942, 56 Stat. 359, 368, which provides that:

> The retired pay of any officer of any of the services mentioned in the title of this Act [Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service] who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall,

> unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

Plaintiff served on active duty as a member of the military forces of the United States prior to November 12, 1918. He was retired from the United States Army on November 30, 1932, for physical disability. On May 15, 1940, plaintiff was recalled to active duty and served thereon until July 31, 1948, when he was returned to inactive status on the Regular Army retired list. On plaintiff's last day of active duty he was receiving the active duty pay of a lieutenant colonel with over 30 years' service, which included approximately 7 years of inactive service on the retired list. Plaintiff's retired pay was computed by the War Department under the provisions of section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085, which did not permit credit for his years of service on the retired list to be included in the computation of retired pay and plaintiff was therefore only credited with his 23 years of active service. Section 203 (a) of the 1948 Act provides in part as follows:

> Each commissioned officer of the Regular Army or of any reserve component of the Army of the United States, and each commissioned officer of the Regular Air Force or of any reserve component of the Air Force of the United States, heretofore or hereafter retired or granted retirement pay under any provision of law shall be advanced on the applicable officers' retired list to the highest temporary grade in which he served satisfactorily for not less than six months while serving on active duty, as determined by the cognizant Secretary, during the period September 9, 1940, to June 30, 1946, and shall receive retired pay at the rate prescribed by law, computed on the basis of the base and longevity pay which he would receive

> if serving on active duty in such higher grade: *Provided*, That retired pay of such highest grade *shall be without credit for service on the retired list*. [Italics supplied.]

Plaintiff contends that his retired pay should have been computed in accordance with the provisions of paragraph 4 of section 15 of the Pay Readjustment Act of 1942, *supra*. Such a computation would have given plaintiff credit for *all* of his service, both on active duty and on the Regular Army retired list, inasmuch as the active duty pay he was receiving at the time of his retirement in 1948 was based on all of such service.

In *Gordon* v. *United States*, 134 C. Cls. 840 (1956), the court held that the expression "hereafter retired" used in paragraph 4 of section 15 of the 1942 Pay Readjustment Act was intended to include not only officers retired after the enactment of the 1942 law, but also officers already on the retired list who, after a recall to active duty, were released to inactive duty on the retired list subsequent to the passage of the 1942 law. Both Gordon and the instant plaintiff served in the armed forces prior to November 12, 1918; both were placed on the retired list prior to the passage of the 1942 statute; both were recalled to active duty and, subsequent to the passage of the 1942 law, were released to inactive duty on the retired list. The only difference in the two cases lies in the fact that Gordon returned to inactive duty on the retired list in 1943, prior to the enactment of the Act of June 29, 1948, *supra*, and plaintiff herein returned to inactive duty on the retired list shortly after the enactment of the 1948 Act.

In its motion for summary judgment defendant takes the position that section 203 (a) of the 1948 Act deprives officers who had served in the military

forces prior to November 12, 1918, of the benefits of paragraph 4 of section 15 of the 1942 Pay Readjustment Act. We are unable to agree with that contention. We are of the opinion that there was no repeal of paragraph 4 of section 15 of the 1942 Act contained in any part of the 1948 Act. On the contrary, section 205 (b) of the 1948 Act expressly reserves to officers like this plaintiff, the benefits of the 1942 legislation. Section 205 (b) provides in part as follows:

> Nothing contained in this title [Title II] shall be construed to deprive any person of any higher retired grade or rank, *or any greater retired or retirement pay to which he or she may be entitled under any other provision of law.* * * * [Italics supplied.]

Paragraph 4 of section 15 of the 1942 Act is certainly another "provision of law" under which this plaintiff is entitled to greater retirement pay than that accorded him by section 203 (a) of the 1948 Act. Defendant does not mention in its brief the effect of section 205 (b) of the 1948 Act. Defendant does seem to suggest that a holding that paragraph 4 of section 15 of the 1942 Act remains in effect after the passage of the 1948 Act, would nullify the provisions of section 203 (a) of the latter act. This, of course, is not the case. Only those few remaining officers who had served prior to November 12, 1918, would be unaffected by the provisions of section 203 (a) of the 1948 Act, whereas the vast majority of officers would fall within the coverage of the 1948 provision.

That Congress did not intend to repeal paragraph 4 of section 15 of the 1942 Pay Readjustment Act is further evidenced by section 531 (b) (34) of the

Career Compensation Act of 1949, 63 Stat. 839, which provides as follows:

> (b) The following Acts and parts of Acts are here repealed:
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> * * * * *
>
> (34) The Act of June 16, 1942 (56 Stat. 359), as amended, *except * * * paragraph 4 of section 15 of such Act, as amended.* [Italics supplied.]

Since plaintiff served on active duty prior to November 12, 1918, and was "hereafter retired" within the meaning of paragraph 4 of section 15 of the 1942 Pay Readjustment Act, he is entitled to have his retired pay computed at the rate of 75 percent of the active duty pay he was receiving at the time he was returned to inactive duty on the retired list of the Regular Army in 1948. Plaintiff's active duty pay at the time of his release to inactive duty on the retired list was that of a lieutenant colonel with over 30 years of service. Inasmuch as he was only paid at the rate of 75 percent of the active duty pay of a lieutenant colonel with over 23 years' service (omitting his more than 7 years on the retired list), he is entitled to judgment for so much of the difference in pay due him as is not barred by the statute of limitations. Plaintiff's petition was filed July 26, 1956. In computing plaintiff's retired pay in 1948, the War Department erroneously interpreted the law, and plaintiff is therefore entitled to recover for the period commencing July 1, 1950, and continuing until judgment herein. *Gordon* v. *United States*, *supra*; *Cannon* v. *United States*, 146 F. Supp. 827 (C. Cls. 1956).

Defendants' motion for summary judgment is denied and plaintiff's motion for summary judgment is

granted. Plaintiff is entitled to recover and judgment is entered to that effect with the amount of recovery to be determined pursuant to Rule 38 (c).

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge,* took no part in the consideration and decision of this case.